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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1395.

UNITED STATES OF AMERICA,

Petitioner,

v.

GEORGE J. WILSON, JR.

BRIEF FOR THE RESPONDENT.

Philip D. Lauer, Esquire, counsel appearing on behalf of the Respondent, George J. Wilson, Jr., hereby presents Respondent's Brief on the merits of the issues presented by the United States of America as Petitioner in its Brief.

Respondent relies on the statements of the Petitioner with respect to the opinions below, jurisdiction, questions presented, constitutional provision and statue involved, and statements of facts.

SUMMARY OF ARGUMENT.

The Criminal Appeals Act, 18 U. S. C. 3731, provides for an appeal by the United States to the Court of Appeals "from a decision, judgment, or order of a District Court dismissing an indictment . . . except that no appeal should lie where the Double Jeopardy Clause of the United States Constitution prohibits further prosecution." We are not here concerned with principles of statutory construction, but rather with a determination as to the circumstances under which the Double Jeopardy Clause so "prohibits further prosecution" that a Government appeal is improper.

The District Court in this matter, after presiding over a trial resulting in a jury verdict of guilty, entered a post-trial order dismissing the indictment on the basis of unreasonable and prejudicial pre-indictment prosecutorial delay. The opinion of the Judge specifically referred to testimony heard at trial, and the trial testimony was clearly relevant to the general issue of the case.

Petitioner contends that the matter appealed is purely an error of law and, as such, would not result in a retrial if appellate relief were granted. From this, Petitioner concludes that the Double Jeopardy Clause is not implicated, since Petitioner reads that clause as prohibiting only second trials. It should be noted that, in arguing this matter, Respondent has responded directly to the contentions contained in Petitioner's brief in *United States v. Jenkins*, No. 73-1513, which brief was incorporated by reference in Petitioner's brief.

The ruling of the Court below cannot be neatly characterized as a purely legal ruling, which can be reviewed and, presumably, changed without implicating the Double Jeopardy Clause.

In making this determination, one must consider the historical background of the Double Jeopardy Clause, and it appears that the basic principles are among the oldest and best known in this and other systems of jurisprudence. Tracing history, while informative, does not clearly dispose of the question presented. However, any doubt has been resolved by the decisions of this Court, and the compelling reasoning of those decisions.

In reviewing those decisions, it is apparent that, since *United States v. Sanges,* 144 U. S. 310 (1892), the first case directly concerned with Government appeals in criminal cases, through the present time, this Court has jealously protected criminal defendants from appeals following verdicts of acquittal. The distinction sought by Petitioner, which would exclude from the operation of this principle all cases in which the Judge's decision may be classified as legal and reversible without necessity of retrial, finds no support in any of these cases.

The development of the common law of this country has proceeded to the point described in *United States v. Sisson,* 399 U. S. 267. Although that case was decided under the old Criminal Appeals Act, it was also decided on double jeopardy grounds, equally applicable under the new Act. As noted herein, that portion of the opinion dealing with the double jeopardy question was the only portion of the opinion on which the Court clearly stood together.

The general acceptance of the non-appealability of an acquittal is demonstrated by numerous other decisions of the Courts of Appeals.

The Petitioner next contends that the order terminating the prosecution in this case was not an acquittal. Once again, tracing both the common law and the decisions of this Court, it is apparent that the order entered in this

matter was the functional equivalent of an acquittal. Further, it meets the specific tests established by *United States v. Sisson, supra,* for discerning acquittals. There is no reason for a change in that test, and it is submitted herein that the judgment of the Court below was an acquittal, and therefore not appealable.

ARGUMENT.

I. The Double Jeopardy Clause Bars an Appeal From a Judgment of Aquittal Entered Notwithstanding a Jury Verdict of Guilty, Even When a Successful Appeal Would Not Result in a Retrail, But in the Entry of a Judgment of Conviction and Sentence Thereon.

This case submits for the consideration of your Honorable Court an extremely important issue dealing with the meaning of the Double Jeopardy Clause of the United States Constitution and the statutory construction of the recently amended Criminal Appeals Act, 18 U. S. C., Section 3731. It is submitted that the allowance of an appeal by Petitioner from the order of the District Judge will place the Respondent twice in jeopardy in violation of the clear import of the Criminal Appeals Act and the United States Constitution.

It is admitted that the amendment to the Criminal Appeals Act accomplished by the Omnibus Crime Control and Safe Streets Act of 1970 was brought about in order to permit appeals in a broader variety of cases. The Government was not, however, given an unfettered right to appeal, but was given the right to appeal "from a decision, judgment, or order of a District Court dismissing an indictment . . . except that no appeal shall lie where the Double Jeopardy Clause . . . prohibits further prosecution." Thus it must be determined, in each case, whether the effect of the appeal would be to violate the Double Jeopardy Clause.

While reserving the right to argue that the Double Jeopardy Clause does not bar every appeal which would require a retrial if successful, the fundamental position taken by Petitioner is that a purely legal error, made by a

District Court in entering an order equivalent to an acquittal, may be reviewed without violating the Double Jeopardy Clause. The argument turns on two related legal conclusions: That the matter appealed is purely an error of law, and, as such, will not result in a retrial if appellate relief is granted. It is submitted that such conclusions cannot be applied to the case at bar, and, even if applicable, the prohibitions of the Double Jeopardy Clause cannot be avoided.

1. In its brief in *United States v. Jenkins*, No. 73-1513, upon which Petitioner relies in its argument on this issue, Petitioner characterizes the decision from which the appeal was taken as a purely legal ruling. Such characterization is clearly justified in that case, since the order entered by the District Judge, sitting without a Jury, was accompanied by specific findings of fact and conclusions of law. The decision in *Jenkins* is clearly *not* one "in which the result turned on credibility or demeanor or assessing a mental attitude . . . the facts relevant to the legal ruling were wholly objective and impersonal." (Br. 12).

Although a determination that it only seeks to attack an erroneous legal ruling is important to the Petitioner's argument, such a finding in the instant case would ignore the character of the opinion of the District Judge. After reviewing the criteria of *United States v. Marion*, 404 U. S. 307, regarding the circumstances under which an indictment may be dismissed for prejudicial, pre-indictment prosecutorial delay, the Court concluded that Respondent had been prejudiced by such delay, and thus deprived of a fair trial. In so concluding, the District Judge took

> "notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer (Pet. App. D, 14a-15a): Mr. Wilson, the Defendant, stated (40-41 of the Notes of Testimony of

the pre-trial hearing held on March 14, 1972) that the signing of all union checks was in the hands of Mr. Brinker and Mr. Schaefer. During the trial (N. T. 133-134) the Defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that he ordered no one to write the check in question (N. T. 164-165).

On the Government's side, it was established that the bill from the wedding reception was sent to the Defendant's home address and not to the union (N. T. 62). Also, Mrs. Jean Sippel, the office secretary for the I. B. E. W. and the individual who prepared the checks for the signature of Mr. Brinker and Mr. Schaefer stated that at no time had a check prepared by her been sent back without being signed. Other testimony established that Mr. Wilson controlled the union (N. T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their job to the Defendant (N. T. 80, 181)."

The District Court concluded (Pet. App. D 15a):

"The unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the Government contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial. Because of the unreasonable delay, substantial prejudice resulted which violated the Defendant's due process rights under the Fifth Amendment."

Admittedly the decision of the District Court was *legal* insofar as it concluded, on the basis of applicable law, that the Petitioner had unreasonably delayed in presenting the indictment, and that the Respondent had been prejudiced thereby. However, the decision is clearly not *purely* legal since the legal conclusions are predicated upon factual determinations resolved in favor of the Respondent.

In particular, the facts adduced at both the pre-trial hearing and trial were certainly not without dispute. The Government's testimony would apparently contend that the investigation was not complete as of the date upon which the Trial Court said it was complete, since the FBI agent testified that the matter was thereafter referred to various governmental agencies for consideration. Respondent testified that he had no knowledge of the payment of the check at the time of its payment, but the Government presented testimony to establish that bills had been sent to Respondent's home. It was the clear import of the testimony of Jean Sippel that Messrs. Schaefer and Brinker were merely rubber stamp union officials. whereas the testimony of other Government witnesses, and the Respondent, demonstrated that these persons had complete responsibility in the area of the payment of bills.

It is submitted that the ruling of the District Judge constituted a resolution of mixed questions of law and fact. An appeal by Petitioner must, of necessity, question the legal conclusion *and* the factual determinations supporting those conclusions.

2. Petitioner next contends that, although the Trial Judge's ruling has been labeled an "acquittal", its legal component may still be reviewed separately and distinctly from the findings of fact, leaving one untouched and challenging the other. For the reasons set forth above, this necessary dissection cannot so readily be accomplished here.

3. The question of whether a successful appeal by Petitioner will require a retrial is likewise more complex in this matter than in *Jenkins*. However, it is conceded that, upon a reversal of the order of the District Judge, the judgment of conviction would be entered without a second *trial*, unless some subsequent action on Respondent's other post-trial motions would so require.

4. The balance of the Petitioner's brief with respect to this issue, and the responses herein contained, examines the background of the Double Jeopardy Clause, decisions of this Court dealing with double jeopardy, and attempts at analogizing the issues submitted to other situations held not to implicate the Double Jeopardy Clause. As will be shown herein, the rule urged upon this Court by Petitioner results from the narrowest possible reading of the historical background in subsequent cases dealing with the Double Jeopardy Clause. The order of the District Judge, if it constitutes an acquittal, terminated the jeopardy of Respondent; to now require him to suffer a reversal of that status, and resumption of jeopardy, constitutes putting him, for a second time, "in jeopardy", whether or not a retrial will result.

II. Historical Background of the Double Jeopardy Clause.

1. The scholarly attempts of Appellate Judges and brief writers, in this and related cases, to track the history of the protection against double jeopardy reveal substantial agreement that the concept is, at least, extremely old and firmly rooted in the jurisprudence of most legal systems. As stated by Justice Black, the "(f) ear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." *Bartkus v. Illinois*, 359 U. S. 121, 151 (1959) (Black, J., dissenting). As also noted by Justice Black, the idea of limiting the exposure of a Defendant to one trial and one punish-

ment survived even the Dark Ages through the Canon Law and other christian writings. *Bartkus v. Illinois*, 359 U. S. 121, 152, n. 4 (1959) (Black, J., dissenting). In fact, the avoidance of a second punishment was at the heart of the dispute between Thomas Becket and King Henry II. 1 Pollock and Maitland, A History of English Law 448-49 (2d ed. 1899). It has become so fundamental as to be characterized as one of the universal principles of "reason, justice, and conscience, of which Cicero said: 'Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same.' " Batchelder, Former Jeopardy, 17 Am. L. Rev. 735.

This concept has come to be considered so fundamental to the English common law as to be described as a "universal maxim of the common law." 2 Cooley's Blackstone (4th Ed. 1899), 335, 336. Ultimately, as indicated in Petitioner's brief in *Jenkins* (Br. 18, 19), this developing concept became embodied in the pleas of *auterfoits acquit* and *auterfoits convict*. 4 Blackstones Commentaries, Ch. XXVI, p. 335 (Tucker ed.); IV Hawkins, Pleas Of The Crown 312 (1795 ed.). These common law pleas had as their objective the absolute bar of a second trial. 2 Hawkins, Pleas Of The Crown 515-29 (8th ed. 1824). In fact, the policy became so strong that upon conviction for a felony there could be no writ of error and request for new trial by the Defendant. Myers and Yarborough, *Bix Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 4 (1960). Indeed, the original draft of the Fifth Amendment as submitted to the House of Representatives contained a protection for the Defendant from "more than one punishment or one trial for the same offense . . ." 1 Annals of Congress, 434 (1789-1791). The debate which followed indicated the fear of the members of that body that that language might permit the English rule to become the law of the United States. *Id.* at 753.

The specific question of the appealability of an acquittal is fully explored in the majority opinion of the Court of Appeals in *Jenkins* (*Jenkins*, Pet. App. A, pp. 12a-14a). This much is clear: There is ample evidence to suggest that the draftsmen of the Bill of Rights intended to include in the protection guaranteed therein the common law protections as they existed at that time. It is certainly reasonable to conclude that the framers intended to include the inability of the sovereign to appeal an acquittal after a trial on the merits. However, as suggested in the opinion below in *Jenkins*, any doubt is resolved by the decisions of this Court since the adoption of the Bill of Rights.

It is important to note at this point that such an analysis of the Double Jeopardy Clause, while instructive as to the reasons for the existence of such protection and, to a lesser extent, to the content of same, the specific problem submitted in Petitioner's brief was not known to the common law at that time, and must be governed by the development of the case law in this country since that time. The insistence of the Petitioner that the Double Jeopardy Clause and its antecedents can only be read to protect against a second *trial* is supportable by the common law by reason of its limited development at the time of the adoption of the Bill of Rights. However, the application of those common law principles in the case law of this Court dictates, we submit, a result contrary to that proposed by Petitioner.

III. The Decisions of This Court Bar an Appeal From an Acquittal Where a New Trial Is Not Sought.

(A) The Cases Relied Upon by the Court of Appeals in *United States v. Jenkins*, No. 73-1513, Are Controlling.

In Petitioner's brief in *Jenkins*, upon which Petitioner relies with regard to these issues, Petitioner contends that

the cases relied upon by the Court of Appeals do not bar an appeal in the issue presented. With this contention we disagree. To so hold would be to overlook the clearest of intentions and statements as expressed by this Court in those opinions.

1. *United States v. Ball, 163 U. S. 662.*

Prior to considering this case, one must look to its antecedents. The Supreme Court first considered government appeals in criminal cases in 1892 in *United States v. Sanges,* 144 U. S. 310 (1892). In that case, the Government sued out a writ of error upon a judgment for Defendants sustaining their demurrer to the indictment. In dismissing the writ, this Court held that:

> ". . . under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the state, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provisions for a review of the judgment at the instance of the government." 144 U. S. at 312.

In so holding, this Court reviewed with approval numerous state court decisions refusing to allow the Government to seek review of a judgment in favor of a defendant, whether that judgment was entered by way of acquittal or on a question of law. Although several state

courts had done so on the basis of the Double Jeopardy Clause of the Fifth Amendment, most such decisions were founded more broadly on the developing common law of the United States. Indeed, several pages of the opinion are devoted to reviewing such decisions, and the common law of this country at that time seems overwhelmingly to have precluded Government *appeals* in such cases, and not just retrials. Although the Double Jeopardy Clause was not specifically cited as compelling this holding, the reasoning behind this principle appears to have pervaded the common law of this country and influenced this decision in particular.

It is in this context, then, that *U. S. v. Ball, supra,* was decided. As noted in the Petitioner's brief in *Jenkins* (Br., 27-29), this Court specifically held that a general jury verdict of acquittal could be invoked as a bar to a subsequent prosecution for the same offense, regardless of whether judgment had been entered on the acquittal. However, given the status of American common law at that time, the dictum applicable to this case cannot be dismissed so readily as the Petitioner would urge. In this regard, the Court stated (163 U. S. at 671):

> "As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, *and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution.* However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. *United States v. Sanges,* 144 U. S. 310; *Commonwealth v. Tuck,* 20 Pick. 356, 365; *West v. State,* 2 Zabriskie, (22 N. J. Law,) 212, 231; 1 Lead. Crim. Cas. 532."

Although dictum, the italicized portion of this quote clearly and accurately states the common law and, perhaps prophetically, begins to reveal the narrowness of Petitioner's position. Rather than being merely the gratuitous and presumably accidental dictum pictured by Petitioner, this language recognizes the status of the current common law and the fundamental meaning of the Double Jeopardy Clause.

2. *Kepner v. United States, 195 U. S. 100.*

Kepner was acquitted by a Trial Judge in the Philippines of a charge of embezzlement. The Government appealed to the Supreme Court of the Philippines, which reversed, found the Defendant guilty, and sentenced him. In its review, the Court was directly confronted with the question of whether a provision of an act of Congress, embodying the Double Jeopardy Clause, prevented an appeal by the Government.

In holding that the Double Jeopardy Clause prevented the appeal, the Court treated the statutory provisions as identical in effect to the Fifth Amendment. Although, as noted in Petitioner's brief in *Jenkins* (Br. 30), this Court has admonished that such language is dictum and not conclusive, *Green v. United States*, 355 U. S. 184, 197, n. 16, the reasoning of this Court in applying these principles cannot be abandoned.

Quoting with approval and at length from *United States v. Ball, supra,* this Court refused to allow the appeal:

> "The *Ball* case, 163 U. S., *supra,* establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government. The Court of first instance, having

jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense * * *."

Apparently since the review by the Philippines appellate court would consist of a *de novo* consideration of the entire matter, the Petitioner concludes that this case does no more than preclude a retrial. However, as stated in the opinion of the Court of Appeals in *Jenkins, supra* (*Jenkins*, Pet. App. A. p. 29a), "(s)ince under Philippine practice no further proceedings were required below, the decision belies any view that the Double Jeopardy Clause protects only against the vexation of a second trial." Jeopardy having attached and terminated, *appellate review* is seen as placing Defendant twice in jeopardy. The fact that such review consisted, under Philippine practice, of a de novo consideration, although supportive of the results reached, was not, and cannot be viewed to be, the sole basis for same.

3. *Fong Foo v. United States, 369 U S. 141.*

The factual background for this case is adequately treated in Petitioner's Brief in *Jenkins* (Br., 31). It is admitted that this case is distinguishable from the case at bar, since the District Judge's decision in that case could not be corrected without a second trial. However, it is worthy of note, and was noted by the Court of Appeals in *Jenkins*, for several compelling reasons.

First, the decision barred a retrial because of the entry of a directed acquittal, even where the judgment was clearly entered on the basis of an error of law. This is difficult to square with Petitioner's argument that it should be allowed to correct purely legal errors by appeal, except for

the added fact that no retrial will be required in the instant case.

Surely, the result cannot turn on the timing of the trial judge in entering his erroneous ruling. It is apparently the Petitioner's position that, had Judge Davis entered his ruling (the equivalent of an acquittal) at any point prior in time to the jury verdict, it would be barred from seeking review. Can Respondent be said to stand in greater jeopardy where no verdict was entered, as in *Fong Foo?* Clearly not. The Double jeopardy clause is not a simple, mechanical device to prevent only retrials in such cases.

> "In *United States v. Ball*, 163 U. S. 662, 669 (1896), this Court observed:
>
> "The Constitution of the United States, in the Fifth Amendment, declares, 'Nor shall any person be subject (for the same offense) to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice *put* in jeopardy . . ." (Emphasis added.) The "twice put in jeopardy" language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the "same offense" for which he was initially tried." *Price v. Georgia,* 398 U. S. 323, 326 (1970).

Although this construction is most clearly applicable to cases in which the appeal will require a new trial, it cannot be said to be limited to such cases. In fact, the concept has equal application in this case, where the allowance of the appeal will clearly expose Respondent to entry of judgment of conviction in a case on which he has been tried and, in effect, acquitted.

4. *United States v. Sisson, 399 U. S. 267.*

In this case, the Defendant had been charged with a violation of 50 U. S. C. App. Section 464(a) by failing to obey an order to submit to induction. Certain pre-trial motions were made and dismissed, and the District Court held a trial before a Jury which resulted in a verdict of guilty. The Defendant moved to arrest the judgment, F. R. Cr. P. 34, alleging essentially that the Court lacked jurisdiction because of the illegality of the Viet Nam war. Avoiding this claim altogether, the District Judge entered an order allegedly arresting judgment on the grounds that the District Judge was satisfied that the Defendant had genuine and sincere oral objections to combat service in Viet Nam, further holding that to compel him to render such service would violate the Free Exercise provisions of the First Amendment and the Due Process Clause of the Fifth Amendment.

First let us note that there are certain rather obvious parallels between the *Sisson* case and the case at bar. In both cases, pre-trial motions for dismissal had been dismissed; juries had been empaneled and the case tried to verdict; verdicts of guilty were rendered in both cases; the Trial Court in both cases entered an order, in response to post-trial motions, terminating the prosecution; the post-trial orders in both cases were founded, at least in part, upon evidence adduced at the time of trial.

It is likewise clear that there are certain fundamental differences between the *Sisson* case and the one at bar. In the *Sisson* case, the Court concluded, in part, that an appeal would not be permitted because the language of Section 3731 of the Criminal Appeals Act did not, at that time, allow for such appeals. Since the Criminal Appeals Act has been amended, and some of these restrictions removed, we are confronted with a fundamentally different statute.

However, the opinion goes further, and it is respectfully submitted that the additional language of the opinion was not, as characterized in Petitioner's *Jenkins* brief, "without apparent reason" (Br. 34). Rather, as noted in the opinion of the Court below in *Jenkins*, the additional language in the opinion, to which reference is made below, was the only portion of the opinion in which Justice Harlan wrote for a clear majority.

The relevant language set forth hereinafter makes clear that the Court considered, and relied upon, the Double Jeopardy Clause in reaching its decision, and did not simply conclude the non-appealability of the District Court's ruling on the basis of the absence of a specific statutory authority. Justice Harlan said (399 U. S. at 288-90):

> "The same reason underlying our decision that this was not a decision arresting judgment—i.e., that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty."

Justice Harlan then stated a hypothetical case, similar in factual content to the facts in *Sisson*, except that, in the hypothetical, the trial judge instructed the jury to acquit the Defendant if it made the same factual findings which the Court had made in reaching its post-trial opinion. Justice Harlan concluded that, if the jury had thereafter acquitted, there could be "no doubt that its verdict of acquittal could not be appealed under Section 3731 *no matter how erroneous the Constitutional theory underlying the instructions*," 399 U. S. at 289 (emphasis in original).

If any doubt remained as to whether the opinion dealt solely with the construction of the Criminal Appeals Act,

it was resolved when Justice Harlan stated (399 U. S. at 289):

> "Quite apart from the statute, it is, of course, well settled that an acquittal can 'not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution. . . . In this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense," United States v. Ball, 163 U. S. 662, 671 (1896).

As noted in the opinion of the Court of Appeals (*Jenkins* Pet. App. A, p. 24a), the "passage quited from *Ball* was the very one that Mr. Justice Day had cited in Kepner for the proposition that the Double Jeopardy Clause prohibited an appeal by the Government after acquittal in a criminal case, and that the Court had again relied on in *Fong Foo.*"

It is important to note that this Court, in *Sisson*, was also confronted with a situation in which, if the appeal were successful, no retrial would result. As stated by Mr. Justice White in dissent, a reversal on the basis that the trial judge's legal theory was incorrect would have meant that "the jury's verdict of guilty—with judgment no longer 'arrested'—simply remains in effect." 399 U. S. at 329. The situation was totally analogous to the one here submitted, and was resolved against the allowance of an appeal.

It appears that the issue here submitted, viz., that the Amended Criminal Appeals Act entitles the Government to appeal every acquittal which can be demonstrated to be the result of an error of law, has been rejected by this court in *Sisson*.

As will be noted below, this Court in *Sisson* also dealt at length with the question of whether the action of the

District Judge constituted an acquittal. It is submitted that the Court's action in this case constituted an acquittal.

5. *Price v. Georgia, 398 U. S. 323.*

Although this case is not considered in either the brief or opinion below in *U. S. v. Jenkins,* it has been considered by the Court of Appeals in this case, and will be discussed briefly herein.

In this case, in an opinion rendered during the same month as that in *United States v. Sisson, supra,* this Court held, in part, that a retrial of a criminal defendant, after that defendant had obtained a reversal of his prior conviction, was permissible and did not implicate the Double Jeopardy Clause. However, the Court also held that, after an implicit acquittal on a charge of first degree murder at the second trial, and a conviction thereat of voluntary manslaughter, the defendant could not, after reversal of his conviction, again be tried on the greater offense, since the first verdict had constituted an acquittal on that greater offense.

Thus far, the decision is in complete accord with the law as understood and stated by both parties in these proceedings, and is not directly relevant to the issues submitted. However, what is relevant is the approval indicated by this Court of the language in *United States v. Ball* indicating that the "prohibition (against double jeopardy) is not against being twice punished, but against being twice *put* in jeopardy . . ." (emphasis added). *U. S. v. Ball,* 163 U. S. 662, 669. The Court then stated, in language extremely important to the issue presented, the following:

> "The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." 398 U. S. at 326.

Once again, although this Court was confronted with a question of the permissibility of a second trial, both the reasoning and language used in prohibiting such trial indicate that the Double Jeopardy Clause was not intended, and has not been applied, to simply prevent in any mechanical way second trials after first trials at which jeopardy has attached. Rather, as indicated above, the double jeopardy provisions of the Constitution relate to a host of situations which can result in an accused suffering the risk or potential of a conviction for an offense for which he was initially tried and either acquitted or convicted.

IV. Petitioner's Submission Is Not Supported by Decisions of This Court or Others in Analogous Situations.

In its brief in *United States v. Jenkins,* No. 73-1513, upon which Petitioner relies in this matter, Petitioner concludes that the case law dealing with the appealability of other types of post-jeopardy orders supports its submission in this case. In so doing, Petitioner submits that, because appeals are allowed from orders of courts of appeals reversing convictions and from orders of a district court arresting judgment, logic compels the allowance of an appeal from an order of the type entered by the District Judge in this case.

Petitioner first contends that it is the practice of this Court to review court of appeals decisions that reverse convictions in the District Court. Initially, it must be noted that there is some question as to whether the double jeopardy claim has even been raised in most such cases. In particular, in the cases cited in the Government's brief as supporting this proposition, there do not appear to have been, in the opinions or briefs of counsel, any discussions of potential double jeopardy claims. *United States v. Russell,* 411 U. S. 423; *United States v. Maze,* 414 U. S. 395;

United States v. McGrath, 412 U. S. 936; *United States v. Seeger*, 380 U. S. 163.

Further, although Petitioner correctly notes that this Court rejected one such double jeopardy claim in *Forman v. United States*, 361 U. S. 416, the double jeopardy claim in that case was rejected for a totally different reason. In that case, the Defendant had been convicted, and the Court of Appeals initially reversed the conviction and directed the District Court to enter judgment of acquittal. However, upon rehearing, the order of the Court of Appeals was modified, and an order was entered directing a new trial. In that decision, this Court held that when the Petitioner:

> ". . . opened up the case by appealing from his conviction, he subjected himself to the power of the appellate court to direct such 'appropriate' order as it thought 'justified under the circumstances.' Its original direction was subject to revision on rehearing. The original opinion was entirely interlocutory and no mandate was ever issued thereon. It never became final and was subject to further action on rehearing. . . . The petition on rehearing operates to suspend the finality of the . . . court's judgment, pending further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." (citations omitted). 361 U. S. at 427.

It is interesting to note that, although the Court rejected a double jeopardy claim in that case, it did so on the basis of a finding that no acquittal had ever effectively been entered. Further, it is submitted that the proper rule in such cases should be that an order of a Court of Appeals, directing a true verdict of acquittal, is not appealable. However, even assuming the appealability of such an order,

such orders are not truly analogous to orders of a District Judge accomplishing an acquittal or its equivalent. This is so because, in so doing, the District Judge is sitting as a true finder of facts. In particular, his decision, to the extent that it resolves factual issues, is a product of all of the occurrences during the taking of testimony. The District Judge has available to him not only the words of the witnesses, but their demeanor, appearance, and all other tests normally used by finders of fact in resolving factual issues. This is clearly not true in the case of a Court of Appeals, and it could well be argued that, if some distinction is to be made, a factual determination by the District Judge should be accorded greater authority. It can also clearly be argued that, where the verdict of guilty remains as the last word of the Trial Court, all proceedings in the Appellate Courts simply constitute review of that finding, and cannot be considered to have been reversed until the review process is complete. Such is not the case in this case, where the order of the District Court, despite a verdict of guilty, is one terminating the prosecution and, we contend, equivalent to a verdict of acquittal.

Petitioner further relies upon the opinion of Judge Learned Hand in *United States v. Zisblatt*, 172 F. 2d 740 (C. A. 2), appeal dismissed, 336 U. S. 934. However, in that case the Court of Appeals for the Second Circuit specifically did not hold that an appeal from a post-conviction order of the District Court dismissing an indictment under the Statute of Limitations was not barred by the Double Jeopardy Clause. Rather, that Court held that they had no jurisdiction to hear the appeal, and certified the case to the Supreme Court. Judge Learned Hand characterized the decision of the District Court as a judgment sustaining a "special plea in bar", and thus potentially appealable directly to the Supreme Court. Judge Hand also recognized a potential double jeopardy claim:

> "However, . . . the motions, which he did entertain and eventually granted, were all made after the trial had begun and, therefore, after the defendant had—literally at any rate—'been put in jeopardy'. There is, therefore, a good argument for saying that no appeal lies to the Supreme Court." (172 F. 2d at 742).

Nor can Petitioner take comfort from *U. S. v. Weinstein*, 452 F. 2d 704, cert. denied, *sub nom. Grunberger v. U. S.*, 406 U. S. 917, upon which Petitioner also relies in its Brief in *Jenkins* (Br. 40). In that case, the Second Circuit Court of Appeals granted a petition by the Government for writ of mandamus to the trial Judge, directing him to vacate his post-verdict, post-conviction order dismissing the indictment. In so doing, the Court specifically found that there had been no acquittal, and did so using the principles enunciated in *U. S. v. Sisson*, 399 U. S. 267. The factual bases for such a finding were obvious: a judgment of conviction had been entered prior to the Judge's order; the Judge himself repeatedly refused to acquit the Defendant; the Judge stated his correct belief that he had no "right" to direct acquittal for the reasons stated. Looking "at what (the) District Court did rather than at what it said it was doing", *U. S. v. Sisson*, 399 U. S. at 270, the Court found that no acquittal had been accomplished and that no double jeopardy would ensue from its order.

Accordingly, it is respectfully submitted that there is no support for the issue submitted in any of these areas, and the appeal sought by Petitioner in this case should be barred.

V. Summary—Application of Double Jeopardy Clause.

In summary, the position urged by Petitioner constitutes an unworkable and constitutionally unacceptable ap-

proach to determining the appeal of an Order, and the application thereto of the Double Jeopardy Clause. We do serious harm to the fair administration of criminal justice if we so belabor the fair and obvious meaning of the concepts here in issue that they are no longer capable of predictable and reasonable application. Petitioner has presented numerous cases thus far in the Brief, all of which demonstrate that there is a reasonable Double Jeopardy standard, and that it is generally understood as precluding government appeals in cases such as the instant one.

We believe that Judge Friendly, in considering this issue in *U. S. v. Jenkins, supra,* said it best when, in discussing the *Sisson* opinion, he stated (490 F. 2d 878):

> "These pages of the *Sisson* opinion seem to us to be dispositive of the instant case. In essence the judge's post-trial ruling in *Sisson* had made the jury trial a nullity and had resulted in a trial to the judge, who had rendered a judgment of acquittal on the merits. Even though this action was based on an erroneous legal ground, the Double Jeopardy clause prevented a new trial. Indeed, we have already interpreted *Fong Foo* and *Sisson* to mean precisely this. *United States v. Weinstein,* 452 F. 2d 704, 709 (2 Cir. 1971), *cert. denied,* 406 U. S. 917 (1972)."

Further, 490 F. 2d 879:

> "The Government argues that a reversal here would not require Jenkins to undergo the burden of a second trial, since the judge would simply be directed to alter his erroneous conclusions, . . . and Jenkins' only vexation would lie in being convicted rather than acquitted. We are not certain the matter is quite that simple. . . . But apart from that, the absence of need for a second trial would not distinguish *Sisson.* As Mr. Justice White pointed out in dissent, a reversal

there on the basis that the trial judge's legal theory was incorrect would simply have meant that 'the jury's verdict of guilty—with judgment no longer "arrested"—simply remains in effect.' 399 U. S. at 329. Furthermore, although what we must decide is the case before us, the Government has sought a ruling limited to bench trials where an acquittal plea can be traced to a demonstrable error of law and no further evidentiary hearing is needed. It asserts that the amended Criminal Appeals Act entitles it to appeal every acquittal which can be demonstrated to be the result of an error of law by the judge. Boldly facing up to its problems, the Government contends that the Double Jeopardy clause should be read to permit a retrial even on an erroneous instruction, a position Justice Harlan rejected out-of-hand in *Sisson*, 399 U. S. at 289. We think that, so long as *Kepner* and *Sisson* stand, the clause forbids a retrial whenever the trier of the facts has rendered a legal determination of innocence 'on the basis of facts adduced at the trial relating to the general issue of the case.' 399 U. S. at 290 n. 19."

VI. An Order Terminating a Prosecution Because of Unnecessary Delay in Indictment Is an Acquittal Under the Facts in This Case.

The Petitioner next turns to its contention that the Order entered by the District Judge, terminating the prosecution on the ground of unnecessary pre-indictment delay, prejudicial to Respondent, did not constitute an acquittal. In so doing, Petitioner urges that, despite the fact that this determination was predicated upon evidence heard at trial and relevant to the general issue of guilt or innocence, the Order cannot be characterized as an unappealable "acquittal" for the purposes of the double jeopardy clause.

The reliance of Petitioner upon *U. S. v. Marion*, 404 U. S. 307, is inapposite. In that case, the District Court granted a pre-trial motion, dismissing the indictment on the ground of unreasonable delay, and finding substantial prejudice to the Defendant. This Court, in determining that the Order could be appealed, necessarily found that, since the Order had been entered pre-trial, and since the Order could not be considered as a determination relating to the guilt or innocence of the accused, such a determination would have to await the evidence presented at trial. This is a substantially different situation from the case at bar, where the Order followed the completion of trial testimony, and was substantially predicated on that testimony.

A. The Common Law Definition of an Acquittal.

It is conceded that the common law understanding of an acquittal contemplated a finding of "not guilty" on the general issue of guilt or innocence. In so conceding, however, it is to be noted that the common law precedents relied upon by Petitioner are devoid of any language which would preclude the definition of an acquittal urged by Respondent and applied most recently by this Court.

B. The Dismissal Was an Acquittal Under the Established Construction of the Double Jeopardy Clause as Enunciated by This Court.

Once again, Petitioner's discussion of this topic is replete with case references in which a consideration of the definition of acquittal did not require a resolution of the issue here submitted. For instance, in *United States v. Ball*, 163 U. S. 662, the Defendant had been acquitted by a jury verdict. It was this acquittal which barred his subsequent prosecution and trial. The Court was not called upon to define, and did not define, this concept. Similarly,

in *Kepner v. United States, supra,* although the Court held a verdict of acquittal to bar a subsequent prosecution, the Court did not attempt to define the meaning of the concept of "acquittal". It is true that, in applying this concept to these cases, the Court recognized an acquittal as involving the failure of the prosecution to submit convincing evidence establishing the existence of the elements of the offense. It cannot be concluded, however, from the authority presented by Petitioner, that the failure to consider factual settings such as the one presented somehow precludes a finding that the order in this case was an acquittal. To the contrary, the more recent decisions of this Court would seem to dictate that the order of the District Judge below was, in effect, an acquittal for double jeopardy purposes.

In the instant matter, the Court of Appeals, in concluding that the dismissal by the District Judge was an acquittal, relied upon this Court's statement of that concept in *United States v. Sisson, supra,* 399 U. S. 267, as adopted in *United States v. Jorn,* 400 U. S. 470, 478 n. 7:

> "[T]he trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case . . .'"

Petitioner concedes that it is true that the evidence on which the District Court relied in dismissing the indictment was "adduced at the trial" and that it related to the "general issue of the case." In so doing, however, Petitioner also contends that the same evidence was adduced at the pre-trial hearings, and that the fact that the evidence was related to the general issue of the case was wholly fortuitous.

With regard to the first contention, that the evidence was also adduced at the pre-trial hearings, it is respect-

fully submitted that the evidence presented at the trial was substantially greater in volume and effect than that presented at the pre-trial hearings, and that the testimony relied upon by the Court at trial was not simply a restatement of the pre-trial testimony. In the opinion below, the District Judge referred to the testimony as follows (Pet. App. D, p. 14A):

> "The Court takes notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer. . . . During the trial (N. T. 133-134) the defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that he ordered no one to write the check in question (N. T. 164-165).
>
> On the government's side, it was established that the bill from the wedding reception was sent to the defendant's home address and not to the union (N. T. 62). . . . Other testimony established that Mr. Wilson controlled the union (N. T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their jobs to the defendant (N. T. 80, 181).
>
> . . . The Court finds that the unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the government contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial."

In addition, although not specifically mentioned in the opinion of the District Judge, there are considerable areas of trial testimony relevant to both the issues decided by

the Court, and the general issues of the case. The entire testimony of Jean D. Sippel (App., 76-91) deals with the payment of the check which was the subject of the prosecution, the procedures followed for the preparation and payment of such checks, the role in the union organization of the Respondent and other officers, and other matters relevant to both issues. The testimony of Fred Thompson (App., 109-131) was likewise extremely relevant to both issues. In particular, Mr. Thompson testified at some length as to the extent to which Respondent was involved in Public Relations activities relating to the non-profit housing project conducted by the union (App., 121-125), all of which testimony is obviously relevant and important to the question of the Respondent's intentions with regard to the check (and thus the issue of guilt or innocence), as well as the issue of the necessity of the testimony of Mr. Schaefer, the missing witness. It is to be noted that Mr. Thompson did not appear as a witness at the pre-trial hearings. Similarly, and perhaps most important, Respondent himself testified in great detail as to all of these matters at the time of trial (App., 135-196). (It is significant to note that Respondent testified only at the second pre-trial hearing, and his testimony on that occasion consumed only 16 pages. See App., 48-64.)

No useful purpose can be served by a complete review of all of the trial testimony, and a comparison with the pre-trial testimony, for much the same reasons that it is impossible to divine the precise trial testimony upon which the District Judge relied in entering his Order. It is for precisely this reason, it is submitted, that the *Sisson* definition of acquittal becomes necessary. Clearly, there was a host of testimony at the trial relevant to these issues, and, just as clearly, the trial testimony was substantially more complete and varied. It was likewise con-

siderably more supporting of the Judge's Order, particularly with reference to the question of prejudice suffered by the Defendant.

Turning to an examination of *United States v. Sisson,* one notes initially that the cases are strikingly similar in their factual background. In that case, as discussed above, Defendant made certain pre-trial motions which were dismissed, and proceeded to a trial which resulted in a verdict of guilty. Following the filing of post-trial motions, the District Judge entered an order allegedly arresting judgment on grounds which were legally erroneous. As noted above, the Court concluded, in part, that an appeal would not be permitted because of the language of Section 3731 of the Criminal Appeals Act did not, at that time, allow for such appeals. However, this was not the end of the decision. As noted above, the Court also concluded, in the only portion of the opinion in which Justice Harlan wrote for a clear majority, that the order of the Trial Court in that case had been an acquittal, and was therefore not appealable on double jeopardy principles.

In so holding, the Court decided, in language elsewhere herein recited, as follows (399 U. S. at 288-90):

> "The same reason underlying our decision that this was not a decision arresting judgment—i.e., that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty."

Also as noted above, Justice Harlan thereafter stated a hypothetical case, similar in factual content to the facts in *Sisson*, except that the Trial Judge instructed the jury to acquit the Defendant if it, the jury, made the same

factual findings which the Court had made in reaching its post-trial opinion. Justice Harlan concluded that, if the Jury had thereafter acquitted, there could be "no doubt that its verdict of acquittal could not be appealed under Section 3731 *no matter how erroneous the constitutional theory underlying the instructions*" 399 U. S. at 289 (emphasis in original).

After considering the hypothetical, the Court considered the differences between the hypothetical case and the case before it, concluding that the differences did not compel a different result.

The reference to Rule 29 of the Federal Rules of Criminal Procedure in Petitioner's Brief constitutes, in the opinion of the writer, an exaggeration of the importance of the reference to that Rule in the *Sisson* opinion. While it is correct that a judgment of acquittal may be entered pursuant to Rule 29 only "if the evidence is insufficient to sustain a conviction," it is not true, as is impliedly suggested by Petitioner's Brief, that an Order must clearly find the evidence insufficient in order to constitute an acquittal. Indeed, it is suggested that it is precisely because the post-trial order in *Sisson* did not clearly express the intent of the Judge that this Court determined that another test must be used. That test must equally apply here. The fact that the Judge did not specifically find the evidence insufficient is not dispositive; the test for an acquittal expounded in *Sisson* is nonetheless met.

The alteration of the *Sisson* rule suggested by Petitioner (Br., 28) would, it is submitted, reduce the rule to an inapplicable verity. There is no question that the redefinition proposed by Petitioner would define an acquittal. It would not, however, allow for its application in cases where the *essential* tests of an acquittal have been met, without specifically making the ultimate conclusion. Those

essential tests are those formulated in *Sisson*, viz.: legal determination founded upon evidence adduced at trial, which evidence goes to the general issue of the case.

In *U. S. v. Jorn, supra*, this Court was confronted with an appeal from an order dismissing an indictment on double jeopardy grounds after a District Judge had improperly and unilaterally declared a mistrial in order to permit several government witnesses to consult with their attorneys in order to determine whether they should waive their privilege against self-incrimination and testify. On appeal by the Government, this Court agreed that the District Court's judgment was appealable by the Government, and the judgment below was affirmed.

While rejecting the position of Justices Black and Brennan, who concluded that the action of the Trial Judge amounted to an acquittal, Mr. Justice Harlan wrote (400 U. S. at 478 n. 7):

> "It is clear from the record in this case that Judge Ritter's action cannot, as two members of the Court suggest, be classified as an 'acquittal' for purposes of this Court's jurisdiction over the appeal under 18 U. S. C. Section 3731. * * *
>
> Of course, as we noted in *Sisson, supra*, at 290, the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction. But *Sisson* goes on to articulate the criterion of an 'acquittal' for purposes of assessing our jurisdiction to review: the trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case * * *.' *Sisson, supra*, at 290 n. 19. The record in this case is utterly devoid of any indication of reliance by Judge Ritter on facts relating to the general issue of the case, thereby surely

distinguishing this case from *Sisson*, and, one would think, under the very reasoning of *Sisson*, compelling the conclusion that whatever else Judge Ritter may have done, he did not 'acquit' the defendant in the relevant sense."

It is apparent that, although concluding that the action of the District Judge was not an acquittal, this Court applied the *Sisson* test for determining whether it was an acquittal. In so doing, it was determined that the action did not constitute an acquittal because of the absence of any indication that the Trial Judge relied upon facts relating to the general issue of the case. Once again, this Court refused to require the application of such a strict definition as is urged by Petitioner.

This Court in *Jorn* did not mean to imply that a post-trial order of a new trial following conviction would acquit a Defendant. Certainly, no such result would be required by the *Sisson-Jorn* definition of acquittal. Such an Order does not terminate the proceedings at the trial level, and it has frequently been held that, in consideration of a motion for new trial following conviction, the Defendant is considered to have waived a double jeopardy claim with respect to that motion. Thus, whether it be deemed an acquittal or otherwise would be immaterial, and the prosecution would continue. The fundamental distinction between these situations is readily apparent.

Finally, in *Fong Foo v. U. S., supra*, the trial Court's termination of the trial shortly after commencement of the prosecution's case was considered to be an acquittal and thus not reviewable. Although the Petitioner contends that this result is consistent with its position, it must be noted that the trial Court's ruling was deemed an acquittal even though the prosecution's case had not been completed. Clearly, the trial Judge's ruling could not have been con-

sidered a determination of the insufficiency of the evidence, since all of the evidence was not then in. Rather, this holding is consistent with the *Sisson* definition of acquittal, and exemplary of the reasons for, and the rectitude of, that definition.

C. The Application of the *Sisson* Definition of Acquittal in the Courts of Appeals Has Been Consistent and Requires a Finding That Respondent Was Acquitted.

1. *Post-Trial Orders.* Petitioner again relies heavily upon *U. S. v. Weinstein,* 452 F. 2d 704, cert. denied, *sub nom. Grunberger v. U. S.,* 406 U. S. 917. It is respectfully submitted that the reliance of Petitioner upon this authority is inappropriate.

In *Weinstein,* as indicated above, the Court specifically found no acquittal, and the Judge repeatedly refused to acquit the Defendant. Further, the decision clearly refuses to make a finding even resembling an acquittal, and it was the specific refusal of the District Judge to characterize his judgment as an acquittal which was most compelling to the Circuit Court.

Indicative of the reasoning of the Circuit Court in finding no acquittal is the following statement:

> "We have the gravest doubt whether the judge's undoubted power to set aside of verdict and enter a judgment of acquittal, F. R. Cr. P. 29(c) can survive the entry of a *judgment* of conviction; the two actions seem antithetical. Beyond that, however, to characterize the judge's order dismissing the indictment as one of acquittal would be to attribute to him a purpose he repeatedly and rightly disclaimed. We have already cited numerous instances of disclaimers; there are many more." 452 F. 2d at 713.

In *United States v. Whitted,* 454 F. 2d 642, the Court of Appeals for the Eighth Circuit was confronted with a situation in which, following a jury verdict of guilty in a perjury prosecution and the filing of post-trial motions, the Trial Court dismissed the indictment because the indictment may have been returned on the basis of bias and prejudice against the Defendant. In reversing this decision, the Circuit Court relied heavily on *United States v. Dooling,* 406 F. 2d 192 (2nd Cir.), cert. denied, *sub nom. Persico v. United States,* 395 U. S. 911 (1969), a second circuit case in which a similar termination of a prosecution on extremely tenuous grounds had been held to be the proper subject of mandamus. Finding no authority for the entry of such an order by a District Judge, the Circuit Court noted:

> "But as the second circuit has said, '. . . it does not lie in (the district court's) power to put an end to the case by dismissal because of vague and unsubstantiated doubts . . .' We do not believe that the trial court's attempted justification for dismissing this indictment amounts to anything more than 'vague and unsubstantiated doubts.'" 454 F. 2d at 646.

There is no dispute that the ruling of the District Court was erroneous; however, the decision is singularly lacking in support for any definition of acquittal, since the concept played no part in the opinion. Apparently, the issue was never raised. Notwithstanding the statement of the Petitioner to the contrary in its brief (Br., 38), the order of the Court of Appeals in this case was not based in any way on *U. S. v. Weinstein, supra;* the references to *Weinstein* were merely ancillary.

Petitioner also seeks to rely on *U. S. v. Jenkins,* 490 F. 2d 868, cert. granted, May 28, 1974 (No. 73-1513) as using the criteria for acquittal which it urges. We re-

spectfully submit that this conclusion is based upon a misreading of that decision. While it is true that, in summary, Judge Friendly noted (490 F. 2d at 880):

> "*Sisson* held that when a guilty verdict has been nullified by a judge's decision to acquit *on the merits*, the Double Jeopardy Clause prevented an appellate court from directing the entry of a judgment of conviction." (Emphasis supplied),

it must be noted that this opinion specifically noted and approved the *Sisson* definition of an acquittal as an order "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial." 490 F. 2d at 868. After concluding, on the basis of the *Sisson* definition, that the Defendant had been acquitted, Judge Friendly said further "(h)is ruling was based on facts developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case." 490 F. 2d at 878. Clearly, the *Jenkins* Court adopted the *Sisson-Jorn* formulation of "acquittal".

Similarly, *U. S. v. McFadden*, 462 F. 2d 484, relied upon by Petitioner, cited *Sisson* in holding that Defendant therein had been acquitted at a trial before a District Judge who, after trial, entered an order dismissing the indictment on the basis of the unconstitutionality of the section of the Selective Service Law allegedly violated. *U. S. v. McFadden*, 309 F. Supp. 502. This was not the acquittal based merely on the insufficiency of the evidence urged by Petitioner.

All of these cases demonstrate an adherence to, and application of, the *Sisson* definition of acquittal as urged by Respondent. That such an interpretation is workable and reasonable can be gathered from a careful reading of all these cases.

2. *Pre-Trial Orders.* Petitioner reviews in its Brief a number of decisions involving pre-tria' orders and determinations considering whether those orders constituted acquittals. While it is true that some of these decisions have applied the "insufficiency of the evidence" test for an acquittal urged by Petitioner, the application of that test was compelled in each case by the factual setting in which the opinion occurred. Clearly, where the District Judge's action has been such as to constitute a conclusion that the evidence would be insufficient to convict, there has occurred an acquittal. What is not clear, and what remains unresolved be these cases, are the reasons for concluding that acquittals occur *only* in such cases. Finally, it appears rather obvious that the *Sisson-Jorn* formulation of acquittal will find limited application in pre-trial orders, since that definition requires that the order be entered on the basis of testimony adduced at trial.

VII. Summary—Definition of Acquittal.

Once again, Petitioner seeks to impose a mechanical test for discerning acquittals. It would require, in each case, a clear finding that the evidence presented had been insufficient to sustain a verdict of guilty.

It is submitted that, while the Petitioner's test clearly defines the classic form of acquittal, the definition must be more inclusive. The *Sisson-Jorn* definition provides a simple, workable test for discerning an acquittal, and the necessity of such a test is apparent from most of the cases cited by Petitioner. In many of these, no specific finding of the insufficiency of the evidence can be discerned; rather, the Order consists of a termination of the prosecution for reasons dealing with both law and fact, and with facts relevant to the general issue and otherwise.

In short, the definition of acquittal urged herein provides a barometer against which rulings of the District Judges can be measured in determining their status as acquittals.

The use of the definition of acquittal urged herein, and previously adopted by this Court, is compelling also for reasons of simple logic. While it is not either customary or sufficiently sophisticated to be cited to this Court with any degree of frequency, Black's Law Dictionary is of some assistance in this regard. An acquittal is there defined, with regard to crimes, as "the legal and formal certification of innocence of the person who has been charged with a crime; a deliverance or setting free of a person from a charge of guilt." Black's Law Dictionary, Fourth edition. While this is, admittedly, a most unreasonably simplistic definition, it does, nonetheless, indicate clearly the fundamental nature of acquittal, as understood everywhere and to everyone.

Clearly, we do not suggest that any termination of a criminal proceeding favorable to the defense would constitute an acquittal. However, where, as in *Sisson*, you have a post-trial order terminating a prosecution on the basis of facts heard at trial, which facts are relevant to the general issue of the case, the Order can only be described as an acquittal in the classic sense. To require an acquittal to contain more is to elevate form over substance. Petitioner's definition would allow appellate Courts to inquire as to the reasons for a trial judge's rulings, and the facts upon which the Trial Court relied, at least where the acquittal was accomplished by a memorandum or opinion. This, it seems to the writer, is precisely the reason for the *Sisson* test. Appellate Courts should not be entitled to "second-guess" the reasoning or reasonableness of the Order of the Judge presiding

over the proceeding where the facts were found. So long as his decision can reasonably be said to have been predicated upon facts heard at the trial and relevant to the general issue of the case, that decision should remain undisturbed. There is no reason, in logic or law, to conclude that such an Order is not an acquittal.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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